IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1660

U.S. LABOR PARTY,

Petitioner,

v.

GRENVILLE B. WHITMAN,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF MARYLAND

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Grenville B. Whitman, Respondent, by Philip L. Marcus, his attorney, opposes the petition for a writ of *certiorari* to be directed to the Court of Appeals of Maryland.

FACTS

Respondent adopts the statement of facts in the opinion of the Maryland Court of Special Appeals, at pages A.6 through A.9 of the petition herein.

ARGUMENT

I.

THE TRIAL COURT WAS CORRECT IN DETERMINING THAT THE WORDS IN QUESTION MIGHT UNDER THE FIRST AMENDMENT BE TAKEN LITERALLY AND WERE THUS ACTIONABLE.

This Court, in *Greenbelt Cooperative Publishing Company v. Bresler*, 398 U.S. 6 (1970), recognized that certain written statements, although libelous taken in isolation, were not actionable in the circumstances. The Court of Appeals of Maryland enforced the same proposition in deciding *Werber v. Klopfer*, 260 Md. 486, the following year.

The *verbal* context of the remarks in *Bresler* made it impossible that any rational reader would understand the word "blackmail" to be literally a charge of crime. The word was included in a full account of the event at which the charge was levelled at Mr. Bresler. 398 U.S. at 13.

The *social* context of the remarks in *Werber* made it impossible for any of the narrow class of readers of Mr. Werber's leaflet to take it that Professor Klopfer was literally "accused of being a sex deviate, a communist, an advocate of narcotics or a militant black," 260 Md. at 476. How the words might be taken, not how they may have been intended, was legally relevant.

In the case at bar the trial court and the Maryland Court of Special Appeals both found that neither the verbal context of the leaflets, nor Mr. Whitman's social position,* made it impossible that some or many rational readers would accept the literal meaning of the alleged libels.

Because the legal question is no longer novel, and the jury and appellate-court "fact finding" was clearly

* Had Mr. Whitman been well known in at least his district he might have won the election.

correct, the writ sought should be denied as to this issue.

II.

THERE WAS CLEAR AND CONVINCING EVIDENCE OF "CONSTITUTIONAL MALICE."

The law is clear: to prove libel a public figure, such as Respondent, must prove by clear and convincing evidence that defendant either knowingly lied or acted in reckless disregard of the truth. *New York Times v. Sullivan*, 376 U.S. 254 (1964).

The Maryland Court of Special Appeals independently examined the facts of this case, and found they met this test. Having first determined that the *Bresler-Werber* test had been met, that the charges must be read literally, that Court determined that neither the leaflets' investigators, writers nor distributors had any evidence Respondent used drugs while in the military, had been in the SS, was involved in gun running, rape or bombing, or could be characterized as paranoid. They had no such evidence. Thus the fact finding of the Maryland Court of Special Appeals was ineluctable, and correct.

Nor did that Court, as asserted at page 15 of the Petition, engage in circular analysis. Rather, the analysis was sequential:

> 1st, determine that the literal, not the rhetorical, meaning is legally significant; 2d, apply the reckless-disregard-of-truth test to the legally-significant, literal meaning; the portions of the total evidence bearing on these two determinations do not overlap.

The recklessness required for a finding of constitutional malice may be established by a finding that defendant's statements are fabricated, the product of his imagination, or so inherently improbable that only

a reckless man would have circulated them. *St. Amant v. Thompson,* 390 U.S. 727 at 732 (1968).

Since the constitutional test of malice is well established, and the fact finding by the Maryland Court of Special Appeals was accurate, there is no basis for a grant of *certiorari* here.

CONCLUSION

The writ of *certiorari* sought should be denied.

Respectfully submitted,

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